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# How to Effectively Advocate for Battered Women When Systems Fail

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## HOW TO EFFECTIVELY ADVOCATE FOR BATTERED WOMEN WHEN SYSTEMS FAIL

Rana Fuller<sup>†</sup>

|   |     |
|---|-----|
| I. INTRODUCTION.....  | 940 |
| II. PRE-FAMILY COURT ACTIONS.....   | 941 |
| A. <i>Orders for Protection</i> .....   | 941 |
| B. <i>No Custody Order, No Police Action</i> .....                              | 944 |
| III. FAMILY COURT ACTIONS.....  | 945 |
| A. <i>Mediation</i> .....   | 946 |
| B. <i>Child Sexual Abuse</i> .....  | 950 |
| C. <i>Custody Evaluators/Guardians ad Litem</i> .....                           | 953 |
| D. <i>Parental Alienation Syndrome</i> .....                                    | 956 |
| 1. <i>The Judge's Guide</i> .....   | 957 |
| 2. <i>PAS Is Not Expert Testimony</i> .....                                     | 958 |
| a. <i>PAS Fails Under Daubert</i> .....   | 958 |
| b. <i>PAS Fails Under Frye</i> .....  | 960 |
| 3. <i>PAS Fails Under Causation</i> .....                                       | 960 |
| a. <i>Approaches to Cross-Examining an Expert</i><br><i>Espousing PAS</i> ..... | 961 |
| b. <i>GALs/CEs</i> .....  | 961 |
| E. <i>Use of Psychological Evaluations</i> .....                                | 962 |
| F. <i>Use of Experts</i> .....  | 965 |
| G. <i>Harassment Through the Court System</i> .....                             | 966 |
| IV. POST-FAMILY COURT ACTIONS.....  | 968 |
| V. GENERAL IDEAS, TIPS, AND THOUGHTS.....                                       | 968 |
| VI. CONCLUSION.....   | 969 |

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“If I only knew what I know now, I would never have left him.”

Anonymous battered woman.

## I. INTRODUCTION

Anyone who works with domestic violence victims has heard this statement before. Every time I hear it, it breaks my heart and frustrates me to no end. When battered women across the country make this statement, they are referring to the legal system—a legal system that has failed them over and over. This legal system has decreased her child support at her abuser’s whim, condoned his harassing behavior, and, in all too many cases, given him custody of the children. We as a society tell battered women that if they leave their abusers, everything will be all right. A battered woman is told that the legal system will protect her, listen to her, help her, and believe her. Sometimes we tell her that she *must* leave; if she does not leave she is a bad mother and her “choice” to stay with the abuser is endangering the children. If she does not leave the abusive person, society says the state should take her children because she is endangering them.

For many battered women, once they leave their abuser, their next nightmare begins. The legal system becomes simply another abuser, filled with untrained and hostile people who are easily manipulated by the batterer. While the domestic violence movement is working hard to deal with a number of these issues through policy and legislation changes, we as attorneys have to represent our clients today. We need tools and resources to help keep our battered women clients and their children safe.

The statistics are staggering. Every year, well over a million people will experience a violent attack perpetrated by an intimate partner.<sup>1</sup> The vast majority of these assaults are against women.<sup>2</sup> Women are twice as likely to be murdered by a male partner than vice versa.<sup>3</sup> Although the number of women murdering their male intimate partners has decreased by two-thirds since 1977,<sup>4</sup> the number of men murdering their female intimate partners has not

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1. UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENT CRIMES 2 (Dec. 1996), <http://www.ojp.usdoj.gov/bjs/abstract/fvc.htm>.

2. *Id.*

3. *Id.*

4. *Id.*

2007]

BATTERED WOMEN

941

decreased nearly as much.<sup>5</sup>

Many victims of domestic violence will end up in the family court system to apply for an order for protection and/or litigate divorce, custody, or child support. Studies have found that fifty percent of contested custody cases involve domestic violence.<sup>6</sup> When domestic violence victims enter the court system, things can go very wrong. Attorneys who serve them can benefit from concrete ideas and suggestions on how to effectively advocate for their clients. This article outlines thoughts and best practices based on experience and literature about domestic violence advocacy. These suggestions are a beginning. It is my hope that, prompted by this article, a national dialogue can begin that will further develop and refine advocacy for battered women and ultimately give domestic violence victims better outcomes in court.

## II. PRE-FAMILY COURT ACTIONS

Domestic violence victims face a number of common legal problems before they are ever involved in a dissolution or paternity action. Below are two common problems with possible solutions.

### A. *Orders for Protection*

Orders for Protection (OFP)<sup>7</sup> are a useful tool for victims of domestic violence. An OFP can give the victim possession of a shared home, temporary custody, a parenting time schedule, and child support.<sup>8</sup> Most importantly, OFPs are first and foremost designed to provide safety to the domestic violence victim.

But in some cases, the OFP hearing can result in a domestic violence victim having more contact with her abuser than she would have if she had never requested the order. This happens mostly when a respondent who has only signed a recognition of parentage requests custody or parenting time in the OFP hearing. To prepare properly, the attorney should know the judge presiding over the hearing and discuss all options with their client before entering the hearing. Reviewing options and likely outcomes before the hearing reduces the potential for a bad outcome.

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5. *Id.*

6. Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 287 (1999).

7. Also called “restraining orders” or “protective orders” in other states.

8. MINN. STAT. § 518B.01, subdiv. 6 (2006).

It remains unresolved whether a father who has only signed recognition of parentage (ROP) at the hospital can be given any custody or parenting time rights in an OFP hearing,<sup>9</sup> but attorneys still have to represent their clients today. In Minnesota, an unmarried mother has sole physical and legal custody of her children until a court rules otherwise.<sup>10</sup> But many unmarried mothers and fathers sign an ROP at the hospital when their child is born. The signed ROP creates a presumption that the male is the biological father.<sup>11</sup> The “ROP dad” may then commence an independent custody action without any further adjudication of parentage.<sup>12</sup> This independent custody action is considered an initial determination of custody and is not supposed to be combined with an OFP proceeding.<sup>13</sup>

There has been much discussion over whether an OFP is an appropriate court action to seek custody or parenting time when the father has only signed an ROP, or if the father should have to file a separate custody action to be granted parenting time. Some judges in Minnesota believe it is appropriate to grant parenting time and possibly custody to a respondent “ROP dad” in an OFP action. Knowing where each judge stands on this issue allows the attorney to properly inform their client of possible outcomes at the OFP hearing.<sup>14</sup>

It is important for any attorney representing a domestic violence victim whose abuser is an “ROP dad” to discuss the possibility that the judge will grant the father parenting time through the OFP. If the client is concerned that the abuser will request parenting time, and the judge who will hear the case is likely to grant parenting time to an “ROP dad” (based on prior decision history, etc.), the attorney should discuss the option of a harassment restraining order, rather than an OFP. A harassment restraining order is limited in two ways. First, it cannot remove the abuser from the home, and second, it cannot grant custody or

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9. As of the writing of this article, a case is pending before the Minnesota Court of Appeals on this very issue. *Beardsley v. Garcia*, No. A06-922 (Minn. Ct. App. filed Feb. 22, 2007).

10. MINN. STAT. § 257.541, subd. 1 (2006).

11. *Id.* § 257.34, subd. 1(c).

12. *Id.* § 257.75, subd. 3.

13. *Id.* § 257.541, subd. 3.

14. If the attorney is unclear about how a judge stands on granting parenting time to an “ROP dad,” the attorney should contact a local domestic violence legal advocate in the county of the hearing. Most domestic violence legal advocates will know how their judges will rule on various issues.

parenting time.<sup>15</sup> Therefore, its usefulness is probably limited to unmarried victims of domestic violence who are not living with their abuser and do not want a parenting time schedule imposed.<sup>16</sup>

If a harassment restraining order will not provide the most appropriate relief for the client, there is another, albeit extreme, option for the client when an OFP hearing goes very wrong; the client can withdraw or dismiss the petition for the OFP. For example, an unmarried domestic violence victim files for an OFP because of escalating abuse. The abuser, who has signed an ROP, but has not filed a custody or parenting time action, has not had or wanted any contact with the children in years. But during the OFP hearing, the abuser requests parenting time. The victim is granted her request for an OFP, but the court grants the abuser's request for parenting time. Now the abuser has access to the victim that he did not have previously. The victim might feel that it is more dangerous for the abuser to have parenting time with the children than for her to be without an OFP.<sup>17</sup> As a result, it might be in the victim's best interests to withdraw the petition before the hearing is over. If that is not possible, it might be advisable to dismiss the order. Absent an OFP and parenting time schedule, the victim remains the sole physical and legal custodian and can limit parenting time as she sees fit. Although this is an extreme option, for some victims of domestic violence it may be the best option.<sup>18</sup> Attorneys should discuss this option with their clients and whether it should be used before the OFP hearing.<sup>19</sup>

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15. MINN. STAT. § 609.748, subdvs. 4, 5 (2006). The statute states that the "court may issue a temporary restraining order ordering the respondent to cease or avoid the harassment of another person or to have no contact with that person . . . ." *Id.* § 609.748, subd. 4. This is the only relief available to a petitioner.

16. Harassment restraining orders are also good for victims of domestic violence when there has not been a recent incident of domestic violence but there have been phone calls, drive-bys, or other harassing behavior. *See id.*

17. I have heard stories from my clients of abusers stating that they only need twenty minutes alone with the children or only need one day of visitation. These clients fear that their abusers will either harm the children or flee with the children out of state or out of the country. Twenty percent of domestic violence victims return to their abuser at least once because of threats to take or harm their children. Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. Vol. 1113, 1117 (April 1996).

18. In our office, we call it "the nuclear option."

19. Remember, safety of the victim and the children is paramount!

*B. No Custody Order, No Police Action*

Being an unmarried parent without a custody order or a parenting time order can also pose a problem for domestic violence victims. In this scenario, the mother is, by statute, the sole legal and physical custodian of the child.<sup>20</sup> The mother is also a victim of domestic violence. The mother and father are not living together because the father is abusive, but the mother is bringing the child to see the father for parenting time. One day, the father decides he will not return the child to the mother. The mother calls the police seeking enforcement of the statute that deems her to be the sole custodian. The police tell her that they will not get involved unless there is a custody or parenting-time order in place. What should the mother do?

The mother, or her attorney, can file an emergency *ex parte* motion requesting custody and ordering the police to retrieve and return the child to her care. Courts, in general, are not fond of these motions, but in practice they seem to be granted when requested.<sup>21</sup> The motion must outline three specific things:<sup>22</sup>

1. The motion and affidavit must state the efforts made to notify the other parties or the reason the other parties were not notified.<sup>23</sup>
2. The motion and affidavit must state whether any prior applications for the relief have been made.<sup>24</sup> If relief has been sought in the past, the affidavit must state the presiding court and judge, the result, and the new facts that lead to the current request.<sup>25</sup>
3. The motion and affidavit must state the reasons for the *ex parte* motion.<sup>26</sup> In a request to grant custody *ex parte* to one party, the court *must* make a finding that a child is in

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20. MINN. STAT. § 257.541, subdiv. 1 (2006).

21. This is my own personal experience; others may have had different outcomes.

22. 3A DAVID F. HERR & LAURIE A. KINDEL, MINNESOTA PRACTICE SERIES: GENERAL RULES OF PRACTICE ANNOTATED R. 3.01, 3.02 (2006).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

immediate danger of physical harm.<sup>27</sup> The attorney should also prepare an order for the judge to sign. The motion should be heard and ruled upon the day it is filed. If granted, the order then needs to be given to the police for enforcement.<sup>28</sup> Another hearing date will be set to determine whether the temporary order should continue.

An emergency *ex parte* motion is a good option to correct a problem quickly, but one must remember that there will always be an additional hearing. This hearing will give the abuser a forum to tell “his side of the story,” and this can sometimes backfire on the victim. Also, this type of action could spur the abuser into filing a custody action for which the victim may be unprepared. As always, it is important for the attorney and client to think through all of the possible outcomes of any motion.

### III. FAMILY COURT ACTIONS

Once a domestic violence victim enters the family court arena, her worst nightmares can unfold. She is subject to a barrage of systems and people who may be hostile toward her or simply ignorant about domestic violence. Batterers are much more likely to seek custody of the children than the average father.<sup>29</sup> When men seek custody of their children, they receive sole or joint custody around seventy percent of the time.<sup>30</sup> The assertion that men are treated unfairly in the family court arena is statistically incorrect. Thus, preparing clients for these possibilities is critical.

27. MINN. STAT. § 518.131, subdiv. 3(b) (2006). See *Coleman v. Coleman*, 493 N.W.2d 133, 136 (Minn. Ct. App. 1992); *Cupp v. Cupp*, No. A05-1139, 2006 WL 852130, at \*2 n.1 (Minn. Ct. App. 2006).

28. Remember to include enforcement language in the emergency motion.

29. Zorza, *supra* note 17 at 1117; Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U.J. GENDER SOC. POL’Y & L. 657, 685 (2003). For a full discussion about why batterers do not make proper parents, see LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002).

30. *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 748 (1990) [hereinafter *Gender Bias Study*]. The study specifically found that when fathers sought custody, they were granted primary physical custody 29% of the time and joint physical custody 65% of the time. *Id.* at 831. Mothers obtained primary physical custody in only 7% of cases. *Id.* This study also found that their results were consistent with other states, citing a California study that found fathers were granted sole custody in 63% of the cases and a nationwide survey that found fathers obtained custody in 51% of all cases. *Id.* at 832.



### A. *Mediation*

Mediation is intended to allow participants to come to a resolution without the bitterness and cost of litigation.<sup>31</sup> While mediation may work very well for non-violent families, in general, it does not work well in families where violence is present<sup>32</sup> and is not recommended.<sup>33</sup> Perhaps the main reason for this is that mediation does not require the abuser to take responsibility for the abusive acts.<sup>34</sup> This, in turn, sends a message to both the participants and to society in general that domestic violence is either tolerable, or that both parties are responsible for domestic violence.<sup>35</sup> The second reason mediation is not recommended is that violence between intimate parties destroys the basic principles of mediation.<sup>36</sup>

Domestic violence conflicts with the principles of mediation in three ways. First, mediation is based on the principle that the process is voluntary.<sup>37</sup> Quite often domestic violence victims participate in mediation because they feel extreme pressure, either from the courts or the abuser, to go to mediation.<sup>38</sup> The voluntariness of the process is also destroyed when a victim of domestic violence agrees to a settlement that is not in her best interest because of threats or physical assaults by the abuser.<sup>39</sup> Obviously, someone who feels forced or manipulated into the process and/or outcome is not participating voluntarily.

A second principle of mediation is that both parties come to

31. Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U.L. REV. 717, 717 (1993).

32. *Id.* at 721–22; Zorza, *supra* note 17, at 1121; *Gender Bias Study*, *supra* note 30, at 747.

33. COMMISSION ON DOMESTIC VIOLENCE, AMERICAN BAR ASSOCIATION, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYERS HANDBOOK 4–17 (1996) [hereinafter HANDBOOK]; Zorza, *supra* note 17, at 1121; Jane C. Murphy & Robert Robinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53, 54 (2005); Treuthart, *supra* note 31, at 721; BANCROFT & SILVERMAN, *supra* note 29, at 124.

34. Zorza, *supra* note 17, at 1121–22; Treuthart, *supra* note 31, at 726–27.

35. Treuthart, *supra* note 31, at 726.

36. Zorza, *supra* note 17, at 1121; Treuthart, *supra* note 31, at 726.

37. Treuthart, *supra* note 31, at 727–28.

38. Murphy & Robinson, *supra* note 33, at 54; Treuthart, *supra* note 31, at 727–28.

39. Zorza, *supra* note 17, at 1121; Treuthart, *supra* note 31, at 728; HANDBOOK, *supra* note 33, at 4–18. I worked with a woman who agreed, in a mediated setting, to give her abuser sole physical custody because he threatened to kill her if she did not.

the table in good faith, and that both parties have equal bargaining power.<sup>40</sup> Rarely does an abuser come to the table in good faith and rarely does the victim have equal bargaining power.<sup>41</sup> By its nature, a relationship involving domestic violence is unequal, no matter how long the parties have been apart.<sup>42</sup> The dynamics of domestic violence are such that the abuse can be continuing in the mediation right in front of the attorneys and the mediator. In every intimate relationship, partners develop “meaningful looks.” These looks can be about anything and will depend on the relationship. People involved in a relationship that involves violence also have these “meaningful looks.” These “looks” can be very intimidating to the victim and can even be threats that only the victim can see and understand.<sup>43</sup>

In addition to nonverbal threats or controls, what the abuser says can also dramatically increase his bargaining power. As with every long term relationship, there is a history of conversations and fights that can be referenced with only a short phrase or a couple of words. The victim and the abuser could have had a fight two years ago where the abuser threatened the victim saying, “If you ever try to leave me and take the children, I will kill you.” Then, in the mediation, the abuser states, “Jane, this is about the children.” The victim could view this as a direct threat on her life because of the past conversation.<sup>44</sup>

The third principle of mediation that is destroyed when domestic violence exists is neutrality.<sup>45</sup> If a mediator is truly going to balance the bargaining power differential, the mediator may

40. HANDBOOK, *supra* note 33, at 4–18; Treuthart, *supra* note 31, at 722.

41. Zorza, *supra* note 17, at 1121; *Gender Bias Study*, *supra* note 30, at 747; Treuthart, *supra* note 31, at 728–29.

42. Zorza, *supra* note 17, at 1121.

43. BANCROFT & SILVERMAN, *supra* note 29, at 125; HANDBOOK, *supra* note 33, at 4–18.

44. In addition to threats in the mediation session, many domestic violence victims report being abused after mediation sessions. Zorza, *supra* note 17, at 1121–22. Also, it is well established that domestic violence victims are at the greatest risk of assault and death after they leave the abuser. Seventy-five percent of domestic violence victims seek emergency medical treatment after leaving their abuser, 75% of calls to the police for domestic violence related offenses occur after the victim has left the abuser, and 50% of domestic violence homicides occur after the victim has left the abuser. Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 348 (1999). Domestic violence victims and their attorneys should take these covert threats very seriously.

45. Treuthart, *supra* note 31, at 729.

have to compromise her neutrality, at least in the eyes of the batterer.<sup>46</sup> It is quite difficult to remain neutral when the mediator has to work to protect the rights of one of the parties. And if the mediator attempts to ignore or fails to give credence to the allegations of abuse, the victim may feel that the mediator is on the abuser's side, destroying the victim's belief that the mediator is neutral.

If the client is leaning toward mediation, the best way for an attorney to prevent the process from going wrong is to properly inform their client of the problems and safety concerns with mediation in a domestic violence context.<sup>47</sup> Attorneys should also advise their clients of other possible options.

But the fact remains that domestic violence victims do end up in various types of mediation, and it is the attorneys' responsibility to protect their clients' interests.<sup>48</sup> As such, there are a number of things the attorney can do to keep the mediation process from going wrong:

1. Advise the client that other remedies are still available, such as orders for protection or criminal actions.<sup>49</sup>
2. If possible, before the mediation starts, obtain temporary orders for custody, parenting time, child support, etc.<sup>50</sup> This enhances clarity and certainty while the mediation is in progress.
3. Assess the qualifications and competence of any possible mediator.<sup>51</sup>
4. Work with the victim to find ways for her to avoid the abuser outside of the mediation room.<sup>52</sup>
5. Attempt to equalize the power imbalance by carefully

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46. *Id.* at 729–30.

47. Murphy & Robinson, *supra* note 33, at 65–66; Treuthart, *supra* note 30, at 744.

48. Treuthart, *supra* note 31, at 742.

49. Murphy & Robinson, *supra* note 33, at 66.

50. *See* HANDBOOK, *supra* note 33, at 4–18.

51. Murphy & Robinson, *supra* note 33, at 66.

52. *See* HANDBOOK, *supra* note 33, at 40–50. This is true regardless of whether the victim is in mediation or attending a court hearing.

evaluating any proposed settlement and comparing the settlement to what the attorney would expect the client to receive through the formal court process.<sup>53</sup> If the attorney believes that the client is giving away too much, it is the attorney's duty to stop the mediation and speak to the client.<sup>54</sup> The client may have very good reasons for what she is willing to agree to, but it is the attorney's responsibility to work through all of the victim's options before any agreement is signed.<sup>55</sup>

Attorneys need to recognize when a mediation is going wrong and put a stop to it. They must pay attention to the body language of both the victim and the abuser at all times.<sup>56</sup> If the attorney feels that the victim is acting intimidated or scared, the attorney should ask for a break to speak to the client. If the victim is shaken by the actions of the abuser, the attorney should suggest ending the mediation, either for the day or terminating the process entirely. But it is important for the attorney to allow the victim to make the decision to end or terminate the mediation. The attorney must respect and support the victim's decision.

If the victim of domestic violence feels that she must continue with the mediation but is concerned about being in the same room with the abuser, the attorney should offer to act as a go-between. Here, the victim would be in one room, the abuser in a second, and the attorneys and the mediator in a third. The attorney could work toward an agreement with only the mediator and opposing counsel

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53. Murphy & Robinson, *supra* note 33, at 66.

54. See generally BANCROFT & SILVERMAN, *supra* note 29, at 125 (describing how batterers sometimes use mediation to psychologically coerce victims into making unreasonable concessions).

55. Ideally, the attorney will have already had a conversation with the client well before the mediation session to discuss and list what types of relief the client is willing and unwilling to negotiate. I call it the client's "bottom line" list. If the client and the attorney are clear about how far the client is willing to negotiate, it may help eliminate any concessions during the mediation. The list and the thought that goes into creating it may also help the victim stand firm on her desired relief.

56. If the attorney does not feel competent in recognizing these reactions in her client, the attorney may think about encouraging the client to have a domestic violence advocate at the mediation to support the victim. But bringing an advocate to a mediation creates a whole set of other issues the attorney will need to discuss with the client, such as the abuser now knowing that the victim is claiming to be a victim of domestic violence. This could possibly compromise the victim's safety. Maxwell, *supra* note 44, at 345-46.

or the abuser, then take the proposed agreement to the victim for discussion. If both attorney and client agree to try this method of mediation, it is important for the attorney to fully explain to the client what happens in the meeting between the mediator and opposing counsel so the client feels like she is in control of the process.

If a victim of domestic violence comes to her attorney after the mediation has finished and is concerned about the result, the attorney may be able to challenge the agreement.<sup>57</sup> Some states have statutes on mediation that direct the court not to order or refer the parties to mediation if there is probable cause that domestic violence has occurred.<sup>58</sup> There is an argument that the mediated agreement could be appealed or unenforceable because the court did not appropriately screen for domestic violence as mandated by statute.<sup>59</sup>

#### B. *Child Sexual Abuse*

A family court case can also go wrong for a victim of domestic violence if there is an allegation of child sexual abuse. Some have argued that allegations of child sexual abuse have increased substantially, and that these allegations are invented by vindictive, manipulative mothers who are trying to get custody or to make the father look bad.

Regardless of these arguments, studies have found that allegations of child sexual abuse are only raised in 2–6%<sup>60</sup> of all divorce cases and less than 10% of contested custody cases.<sup>61</sup> Less than 50% of all child sexual abuse allegations are made by mothers against the child's father.<sup>62</sup> A national study by the Association of Family and Conciliation Courts found that in 9,000 contested custody and parenting-time cases, 50% of the allegations of child sexual abuse were founded, 33% were not founded, and 17% were

57. See Treuthart, *supra* note 31, at 764.

58. E.g., MINN. STAT. § 518.619, subdiv. 2 (2006).

59. Treuthart, *supra* note 31, at 764–65.

60. Joan Zorza, *Representing Mothers in Child Custody Cases with Incest Allegations: Part I—Myths*, 12 DOMESTIC VIOLENCE REP. 1, 4 (Oct./Nov. 2006); P. Susan Penfold, *Questionable Beliefs About Child Sexual Abuse Allegations During Custody Disputes*, 14 CAN. J. FAM. L. 11, 14 (1997); Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 430 (2000); BANCROFT & SILVERMAN, *supra* note 29, at 94.

61. Zorza, *supra* note 60, at 4.

62. *Id.* at 4; Penfold, *supra* note 60, at 19.

inconclusive.<sup>63</sup> Only 14% of the allegations were found to have been made in bad faith.<sup>64</sup> Another study found that 70% of allegations of sexual abuse were founded.<sup>65</sup> Some studies report that less than 9% of allegations of child sexual abuse are false.<sup>66</sup> Finally, another study found that mothers falsely reported child sexual abuse in only 1.3% of the cases, while fathers falsely reported sexual abuse in 21% of the cases.<sup>67</sup>

Studies also confirm that a mother of a sexually abused child is also likely to be a victim of abuse by the perpetrator. One study found that daughters of abusers are 6.5 times more likely to be victims of sexual abuse than other girls.<sup>68</sup> Another study found that abuse of the mother was found in 44.3% of child sexual abuse cases.<sup>69</sup> Many studies have found that domestic violence in the home is a top predictor for child sexual abuse.<sup>70</sup>

Despite the overwhelming statistics that the vast majority of sexual abuse allegations are true, many judges, guardians ad litem, custody evaluators, and other court staff believe that mothers fabricate allegations of sexual abuse to get back at fathers.<sup>71</sup> So what should an attorney do?

First, if a client states she believes a child is being sexually abused, the attorney needs to have a clear conversation with the client. This conversation needs to include explicit statements that the attorney believes the client (if the attorney does not believe the client, he or she probably should not be representing him/her). This is important because many domestic violence victims have been told by their abuser that no one will believe her or the children.<sup>72</sup> In addition, telling the client that she is believed shows empathy and will encourage the client to trust the attorney.<sup>73</sup> This is important to help the attorney gain a clear understanding of

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63. Meier, *supra* note 29, at 683.

64. *Id.*

65. *Id.*

66. Zorza, *supra* note 60, at 4; Penfold, *supra* note 60, at 15. One of the main problems with all of the statistics is the definition of "false." "False" means a report found the abuse did not occur. Penfold, *supra* note 60, at 15. "False" does not mean the person who made the allegation is vindictive or that the allegation was made in bad faith. *Id.*

67. Zorza, *supra* note 60, at 4.

68. BANCROFT & SILVERMAN, *supra* note 29, at 84–85.

69. *Id.*

70. *Id.*

71. Meier, *supra* note 29, at 682.

72. HANDBOOK, *supra* note 33, 2–7.

73. *Id.* at 2–8.

what happened that made the client allege sexual abuse.

Second, the attorney needs to perform a thorough investigation of the allegations.<sup>74</sup> What, if any, evidence is there? Did the child tell anyone else? Who? Is child protection involved? If yes, what is the status of the child protection investigation, what are their thoughts, and will they speak to the attorney? If child protection is not involved, why not, and should it be?

Third, the attorney needs to make an appropriate referral for the child to a therapist who specializes in child sexual abuse. The attorney's local sexual assault or domestic violence organization should be able to provide a referral if needed. The purpose of this referral is not to establish whether the child is telling the truth, but to provide support and counseling to a child that may have experienced a very traumatizing event.

It is important to point out that medical evidence may not exist, and the lack of medical evidence does not mean the sexual abuse did not occur.<sup>75</sup> Oral sex, fondling, and many other forms of molestation do not cause any physical damage.<sup>76</sup> Gentle penetration of the rectum or the vagina can occur without permanent physical damage and can heal within twelve days without scarring.<sup>77</sup> Finally, the hymeneal orifice size is not a dependable indicator of sexual abuse.<sup>78</sup>

Faced with the accusation, an attorney may wonder why the child or client decided now, in the process of a divorce or custody action, to disclose the sexual abuse. The first possible reason is the most basic: the sexual abuse is what led to the dissolution action.<sup>79</sup> Other reasons may be that once the abuser is removed from the home, the child feels safe disclosing the abuse, or that the abuser's ability to enforce secrecy is now gone.<sup>80</sup> The child may also feel that someone will now listen.<sup>81</sup> The client may be in a safe place, both physically and emotionally, to assess the abuser's behavior.<sup>82</sup>

After looking at all the evidence and considering the judge

74. Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases* 25 NEW ENG. L. REV. 1415, 1418–19 (1991).

75. Penfold, *supra* note 60, at 21.

76. *Id.* at 20–21.

77. *Id.*

78. *Id.* at 20.

79. Paquette, *supra* note 74, at 1420.

80. *Id.*; Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1392–93 (1994).

81. Wood, *supra* note 80, at 1392–93.

82. *Id.* at 1393; Paquette, *supra* note 74, at 1420.

and other court officers who would be involved in the case, the attorney needs to have a forthright conversation with the client about her options. The attorney should explain, based on the information and their experience, how they believe the court will rule, for example: no parenting time, supervised parenting time, unsupervised time, etc. It is important that the client fully understands her likelihood of success in the court action.<sup>83</sup> It is imperative that the attorney explain the reasons for these beliefs. The attorney needs to give the client time to think and allow the client the opportunity to question the attorney's reasoning. Once the allegation of abuse is raised, see the sections below which discuss custody evaluators, guardians ad litem, and parental alienation syndrome for ideas on how to effectively advocate in cases that go wrong.

*C. Custody Evaluators/Guardians ad Litem*

Another place where things can go wrong for domestic violence victims is contact with custody evaluators (CE) and guardians ad litem (GAL). Batterers can be very smart and very manipulative. Rarely will a batterer present himself to the court or its personnel like the stereotypical abusers on the TV show, *COPS*. Batterers are often calm, sensitive, and compelling in their minimization, denial, or excuses for the abuse.<sup>84</sup> Batterers can be so charismatic and slick in their version of the truth that it is easy to want to believe them.<sup>85</sup> Society is vulnerable to being manipulated by an abuser, especially those members of society who are not well informed about the dynamics of domestic violence or the behaviors of abusers. Unfortunately, many CEs and GALs are not well informed about the dynamics of domestic violence and are

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83. I have spoken to many battered women whose attorneys never have this conversation with them. The attorney either chose not to raise the concerns about sexual abuse or never fully informed the client about the possible outcomes resulting from the allegations. The clients are often mad and feel betrayed. Some of these clients have filed complaints with the bar or malpractice actions. I have found that my clients prefer being told outright that they have a very hard case to win, rather than never addressing their chances and being surprised when they do not get the outcome they were looking for. This way, the client can make an informed choice with all of the facts. Remember, as attorneys, we work for the client, not the other way around.

84. BANCROFT & SILVERMAN, *supra* note 29, at 122–23.

85. Nancy S. Erickson, *Problems with Custody Evaluations*, 11 DOMESTIC VIOLENCE REP. 67, 67 (June/July 2006); Meier, *supra* note 29, at 690.



susceptible to batterer manipulation.<sup>86</sup>

Domestic violence victims, however, are not usually so calm, charismatic, or slick. They are often very emotional, angry, and suffering from symptoms similar to those associated with post-traumatic stress disorder (PTSD).<sup>87</sup> PTSD can distort a victim's affect and cause the victim to be jumpy, irritable, or impatient.<sup>88</sup> While all of these reactions are normal and understandable to people knowledgeable about domestic violence, uninformed evaluators can think the victim is either lying or an unfit parent.<sup>89</sup>

Unfortunately, many CEs and GALs are ill-prepared to work with victims of violence or their abusers. They are not properly trained in the dynamics of domestic violence, do not understand how domestic violence affects children, are not current on the research about domestic violence, and, sadly, may not believe that domestic violence is relevant in custody cases.<sup>90</sup>

To prepare for this possibility, an attorney first needs to prepare the client for meeting with the GAL or CE. Similar to preparing a client to testify, attorneys need to prepare their clients to speak to someone who holds a lot of power over the outcome of their custody case. Attorneys should warn their clients that CEs and GALs are not their friends, and thus the client should always think critically about what information they share. Attorneys should work with their clients to think of three good things to say about the abuser to show the GAL or CE that the client is not embittered or vindictive.<sup>91</sup> They should review the best-interest factors with their client and help prepare the client to speak clearly about the factors. Attorneys should also talk with their clients about how they have every right to be angry or frustrated with the abuser or the system; however, the client needs to work hard to not show these emotions to the evaluator. The attorney should help the victim clearly define their concerns about the abuser's behavior and have supporting documentation whenever possible. Finally, if the attorney has a victim who can be difficult, remind the victim how important it is to be extra nice to the evaluators.<sup>92</sup>

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86. Erickson, *supra* note 85, at 67.

87. *Id.*; Meier, *supra* note 29, at 691.

88. Meier, *supra* note 29, at 691.

89. *Id.* at 692.

90. *Id.* at 708.

91. It needs to be more than "he showers sometimes."

92. I have had clients who were very angry at their GAL or CE, and rightfully so. But anytime they were asked a question by one of the evaluators that they did

But a bad GAL report or custody evaluation is not the end of the road for a domestic violence victim who has a good, assertive attorney. A competent attorney will challenge the report before and during trial, if necessary. Challenging the report is necessary for two reasons. First, the attorney might convince the judge to give the report little or no weight in the decision making. Second, the victim will at least know that everything was done to protect the children from the abuser. The report can be challenged in several ways:

1. Question the evaluators. Inquire into the evaluator's qualifications, experience, training—both in general and with domestic violence specifically—and how current the evaluator stays with research. Ask for the evaluator's definition of domestic violence. Evaluators often do not know the frequency of domestic violence in our society or that domestic violence is a common factor in a contested custody or parenting time action.
2. Question the evaluator's methods. On what theory was the evaluator's conclusion based? What research did they rely on? What were her sources of information (self-reports, other parties, hearsay, court reports, police reports, etc.)? Did she interview past partners? Many evaluations only contain conclusions, with no facts to support the conclusions. Challenge the evaluator on these conclusions; point out that the evaluator did not support her findings. This can bring into question the evaluator's methods.
3. Hold the evaluator to the evaluation. Do not allow the evaluator to expand or add information that was not included in the final written version submitted to the court. If the information was important, why was it not included in the final report? This can bring into question the completeness of the evaluation.

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not like, they would make a snide remark. Before every meeting with the evaluator, I would remind these clients why they were doing this and to think about the impression they were making and how much power these evaluations hold. It is important for the client to put a smile on her face and answer the questions as nicely as possible.

4. Question whether there was an investigation into the history of domestic violence. Inquire into whether a risk assessment was performed. Examine which risk assessment was used and why that assessment was used. Ask about their consideration of other court cases between the parties, orders, or criminal convictions.<sup>93</sup> Question if domestic violence is relevant to the issue of custody and parenting time.<sup>94</sup>

GALs and CEs make mistakes; they are humans like the rest of us. But those mistakes can send a child to a dangerous and abusive home. It is imperative for an attorney to point out these mistakes to the evaluator and the court in an attempt to protect the victim and the children.

#### *D. Parental Alienation Syndrome*

Parental Alienation Syndrome (PAS)<sup>95</sup> is often alleged in cases involving domestic violence or child sexual abuse. PAS is a theory claiming that it is the mother's fault when a child is afraid, does not want to visit, harbors ambivalent feelings towards the father, or makes claims during a custody dispute that the father is abusive.<sup>96</sup> Richard Gardner, a psychiatrist, developed the PAS theory using his own clinical experience rather than scientific research.<sup>97</sup> According to Gardner, women are very angry and want revenge against the husband who left them; the only way they can get revenge is by using the children against him.<sup>98</sup> Why are women so angry? Gardner explains that it is because men can find new partners more easily, men are generally less angry and frustrated than women, and men can hire better attorneys than women because

93. Judge Marjory Fields, *Lawyer Skills Training for DV Representation: Tips from a Retired Judge*, 12 DOMESTIC VIOLENCE REPORT 1, 1 (Oct./Nov. 2006).

94. A "no" answer to this question leads to many other questions that can be asked of the evaluator. For example, why does this state have laws requiring the court to consider domestic violence as a best interest factor if domestic violence is not important, or why does Child Protective Services remove children from homes in which domestic violence is occurring?

95. Joan Zorza, *Representing Mothers in Child Custody Cases with Incest Allegations: Part II*, 12 DOMESTIC VIOLENCE REP. 17, 28 (Dec./Jan. 2007). PAS is also known as estrangement, parental alienation, alienation, or unfriendly behavior. *Id.*

96. Wood, *supra* note 80, at 1370-72.

97. BANCROFT & SILVERMAN, *supra* note 29, at 136.

98. Wood, *supra* note 80, at 1372.

men have more money.<sup>99</sup> Finally, according to Gardner, it is because women project their sexual fantasies onto their children and male partners.<sup>100</sup> According to Gardner, it is the projection of sexual fantasies by women onto their children and male partners and the outright lying of children that leads to allegations of sexual abuse, which, in Gardner's conclusion, are false.<sup>101</sup>

### 1. *The Judge's Guide*

Regardless of what Gardner and others like him believe, there is no scientific proof that PAS, or anything similar to it, really exists.<sup>102</sup> In 2006, the National Council of Juvenile and Family Court Judges (NCJFCJ) revised their 2004 "Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide."<sup>103</sup> The revised 2006 guide ("Guide") takes a strong stance on PAS, viewing it as an inappropriate and invalid theory. The Guide states that "[u]nder relevant evidentiary standards, the courts should not accept [PAS] testimony."<sup>104</sup> The Guide pronounces that PAS is "discredited" and any testimony offered on PAS should "be ruled inadmissible and/or stricken from the evaluations report" because it does not meet the *Daubert*<sup>105</sup> or *Frye*<sup>106</sup> standards for admission of expert testimony.<sup>107</sup>

The Guide goes on to say that not only is PAS an invalid theory, its application in domestic violence cases is completely wrong.<sup>108</sup> PAS asks the court to ignore the child's concern for his or her own safety and instead to assume that the child is making it all up.<sup>109</sup> It also asks the court to focus on the victim's attempts to protect the child and to ignore the abuser's behavior that led to the

99. *Id.* at 1372.

100. *Id.* at 1372-73.

101. *Id.* at 1373-74; BANCROFT & SILVERMAN, *supra* note 29, at 135-36.

102. Zorza, *supra* note 95, at 28; Meier, *supra* note 29, at 688.

103. I strongly encourage anyone who practices in family law to download a copy of this guide, read it, and quote it. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE (2004), available at <http://www.afccnet.org/pdfs/BenchGuide.pdf>.

104. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE 24 (2006) [hereinafter THE GUIDE].

105. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

106. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

107. THE GUIDE, *supra* note 104, at 24.

108. *Id.*

109. *See id.*

child's fears.<sup>110</sup> Children of abusers have a right to be afraid, and they also have a right to be protected.

Finally, the Guide states several other important conclusions: 1) abusers often accuse the victim of "turning the children against him;"<sup>111</sup> 2) abusers deny their abusive behavior, do not take responsibility for the abuse, and blame the victim;<sup>112</sup> 3) it is proper for victims to protect themselves and their children, which can include limiting the abuser's access to the children;<sup>113</sup> and 4) abusers interfere with the victim's relationships with her children.<sup>114</sup>

## 2. *PAS Is Not Expert Testimony*

Whenever a party presents expert testimony or attempts to enter an evaluation or report into evidence, the validity and reliability thereof must be established beforehand.<sup>115</sup> If the court finds that a report or an expert is not valid, is unreliable, or, depending on the state, does not meet the *Daubert* or *Frye* standards for expert testimony, then the evidence will be inadmissible.<sup>116</sup>

### a. *PAS Fails Under Daubert*

It is important to understand why PAS does not meet the *Daubert* or *Frye* standard for expert testimony. In *Daubert*, the United States Supreme Court ruled that the *Frye* test was supplanted by the Federal Rules of Evidence.<sup>117</sup> While *Daubert* technically only applies in federal courts, many states have adopted the Federal Rules of Evidence, either in whole or in part, and thus adhere to a *Daubert* analysis.<sup>118</sup> The Court found that Rule 702 of the Federal Rules of Evidence states the admissibility standard for expert testimony as: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

110. *See id.*

111. *Id.* at 14.

112. *Id.* at 14, 25.

113. *Id.* at 25.

114. *Id.*

115. *Id.* at 24.

116. *Id.*

117. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993); PETER NORDBERG, *Chapter 2: Daubert in a Nutshell*, in *THE DAUBERT WORLDVIEW*, [http://www.daubertontheweb.com/Chapter\\_2.htm](http://www.daubertontheweb.com/Chapter_2.htm).

118. Wood, *supra* note 80, at 1396.

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”<sup>119</sup> The Court held that expert testimony has to be based in methods and procedures of science, and in order to “assist the trier of fact,” it must be relevant.<sup>120</sup>

When determining whether the testimony is based on methods and procedures of science, a court may ask the following: Has the theory been tested? Has the theory been peer reviewed or published? If known, what is the error rate of the theory? What standard exists for this theory? And, finally, is there widespread acceptance for the theory?<sup>121</sup> But as the *Daubert* decision clearly stated, these questions were only a suggestion of factors for a court to consider, not a mandatory “checklist.”<sup>122</sup>

PAS fails to meet the *Daubert* standard, as the theory is not based on methods or procedures of science.<sup>123</sup> Gardner’s theory is based entirely on his own observations of his own patients.<sup>124</sup> Most of his work has been self-published or published in journals that are not peer reviewed, and experts in the field of psychology have found “no data to support [this] phenomenon.”<sup>125</sup> Finally, the theory is not widely accepted.<sup>126</sup> As expert testimony, PAS should be considered “junk science.”

But even if PAS could meet the standard of being based on methods and procedures of science, PAS is not relevant. For testimony to be relevant, it must be reliable.<sup>127</sup> PAS is not a reliable theory. Gardner believes that most child sexual abuse allegations are false, and thus caused by PAS.<sup>128</sup> In cases of PAS, Gardner recommends removing the child from the care of the alienating parent and placing the child with the non-alienating parent.<sup>129</sup> Gardner recommends the alienating parent only be allowed a few

119. FED. R. EVID. 702; NORDBERG, *supra* note 117.

120. *Daubert*, 509 U.S. at 589–90.

121. *Id.* at 593–94.

122. *Id.* at 593.

123. Wood, *supra* note 80, at 1411–12.

124. *Id.* at 1412.

125. *Id.*; THE GUIDE, *supra* note 104, at 24 & n.53 (quoting AM. PSYCHOLOGICAL ASS’N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 40 (1994)).

126. Wood, *supra* note 80, at 1411–12.

127. *Id.* at 1405.

128. BANCROFT & SILVERMAN, *supra* note 29, at 136; *New Video: Debating Richard Gardner*, 12 DOMESTIC VIOLENCE REP. 27, 27–28 (Dec./Jan. 2007); Wood, *supra* note 80, at 1373.

129. BANCROFT & SILVERMAN, *supra* note 29, at 136.

short phone conversations and should not be allowed to see the child.<sup>130</sup> Gardner has produced no evidence that this helps the child and completely ignores any possible damage that could result from removing a child from their primary caretaker.<sup>131</sup> Without any evidence or research backing Gardner's bold and extreme solution to PAS, how can a judge reasonably rely on such testimony?

*b. PAS Fails Under Frye*

The other test for determining the admissibility of expert testimony is the *Frye* standard. *Frye* holds that expert testimony that is not "generally accepted" should not be admitted into evidence. As discussed above, since the PAS theory is not generally accepted by psychologists, testimony of PAS should not be allowed.

*3. PAS Fails Under Causation*

PAS not only fails to meet the standard for expert testimony, there is also a causation problem.<sup>132</sup> Putting aside domestic violence or child sexual/physical abuse as good reasons a child may be in fear of a parent, a child may have ambivalent feelings toward a parent for other reasons. Children are often very distraught during the separation and divorce of their parents; children may have problems leaving the primary parent because of concerns that the primary parent will leave as well.<sup>133</sup> Some children feel they need to take sides, or may be angry at the parent the child perceives is causing the break-up. Some children may believe that one parent blames the child for the break-up. Some are upset that one parent has found a new partner.<sup>134</sup> Any or all of these reasons (or even some other reasons) could explain why the child does not want to spend time with a parent, and these reasons may have nothing to do with the other parent's behavior.

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130. *Id.* Gardner has also recommended that the child be put in a juvenile detention center, and the mothers should be placed in jail. His opinion is that this will encourage the child to visit with the father. *New Video*, *supra* note 128, at 28.

131. BANCROFT & SILVERMAN, *supra* note 29, at 136; *New Video*, *supra* note 128, at 28.

132. Wood, *supra* note 80, at 1386.

133. *Id.* at 1390.

134. *Id.* at 1389-90.

*a. Approaches to Cross-Examining an Expert Espousing PAS*

1. Challenge the expert's credentials and knowledge of PAS. Where did the expert first learn of PAS? What does the expert know about PAS's research foundation? What did the research consist of? What does the witness know about the research methodology? Who performed the research? Finally, ask the expert to cite scholarly journals where the research was published.
2. Challenge the outcomes of PAS. Using leading questions, obtain the expert's acknowledgment that there are children who have been abused, both physically and/or sexually, by their parents. How can an expert deny this and still be believable by the court? Next, question whether the expert believes that children who have been or are being abused, either sexually or physically, could be legitimately afraid of the person abusing them. Question whether children *should* be afraid of the person who is abusing them. The attorney needs to keep the expert focused on the possible legitimacy of the child's feelings, not what the protective parent is doing, saying, etc. The attorney could go as far as asking if it is good for children to be abused.
3. Ask the expert to explain what problems or behaviors may result when children are abused. Summarize everything the expert said about children who are actually abused (e.g., they can be afraid, it is bad for children to be abused).
4. Ask the expert if a standard test under PAS exists to differentiate between children who *are* being abused and those who are making it up or being "brainwashed" into believing they are being abused. If the answer is that there is a standard test, the attorney should ask for evidence or information on reliability and validity, peer review, publication, research, error rate, who uses or accepts this standard, why child protection is not using this standard, etc.

*b. GALs/CEs*

Most GALs or CEs are unlikely to have performed research on



PAS. Therefore, questioning these witnesses can be a little different; but the basic questions used to challenge the outcomes of the theory can still be used. Question the GAL or CE about how they became aware of PAS. What kind of training does she have in recognizing this behavior in children or protective parents? How familiar is she with PAS-related literature? Is she aware that organizations such as the American Psychological Association and the National Council of Juvenile and Family Court Judges have found there is no supportive evidence for this theory? If the GAL or CE is not using the term “parental alienation syndrome” but is using some other term to describe something very similar, find out if the witness is familiar with PAS and how the theory she uses is different from PAS.

The above ideas, thoughts, and suggestions are not exhaustive. Instead, they are intended to provide basic guidelines on examining the PAS-reliant expert and attacking the testimony’s credibility. It is imperative for attorneys to vigorously challenge the PAS theory and other theories like it as a way to educate judges, other attorneys, GALs and CEs. Vigorous challenge of PAS is essential so that victims of domestic violence will know that they and their attorney did all they could to protect their children, even if they lose.

#### *E. Use of Psychological Evaluations*

Psychological evaluations are widely used by CEs or are ordered by the court in cases involving custody,<sup>135</sup> but the utility of these evaluations in domestic violence situations is, at best, inconclusive. There is no valid psychological evaluation or series of evaluations that can accurately determine a parent’s ability to parent.<sup>136</sup> There also is no psychological test to confirm if someone is an abuser, or if someone is a victim of abuse.<sup>137</sup> No scientific test can show whether a domestic violence victim’s allegations are true.<sup>138</sup> Finally, even incest perpetrators do not show notably elevated rates of psychopathology on currently available

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135. BANCROFT & SILVERMAN, *supra* note 29, at 117.

136. Mary Johanna McCurley, Kathryn J. Murphy & Jonathan W. Gould, *Protecting Children from Incompetent Forensic Evaluations and Expert Testimony*, 19 J. AM. ACAD. MATRIM. LAW. 277, 300 (2005).

137. BANCROFT & SILVERMAN, *supra* note 29, at 118.

138. *Id.*

psychological evaluations.<sup>139</sup>

When a psychological evaluation or similar tool is used in a custody evaluation, the evaluator needs to know if the tool is reliable and valid for use in answering the specific question at hand.<sup>140</sup> If the tool is not reliable, any conclusions the evaluator reaches could be defective.<sup>141</sup> Tests like the Minnesota Multiphasic Personality Inventory—Second (MMPI-2) and the Millon Clinical Multiaxial Inventory—Third Edition (MCMI-III) were not designed to be used in custody evaluations and thus have not been empirically demonstrated to be valid or reliable in this arena.<sup>142</sup>

In general, batterers do not exhibit consistent psychopathology.<sup>143</sup> Unfortunately, domestic violence victims will often appear to have a variety of personality disorders or mental illnesses.<sup>144</sup> This phenomenon could occur for two reasons. First, the very nature of the questions on the test could lead a domestic violence victim to register elevated scores in paranoia or low scores in ego strength.<sup>145</sup> Questions on the MMPI-2 ask if the test taker believes someone is following them, if the test taker is having problems sleeping, if they worry frequently, or if the test taker blames someone else for their problems.<sup>146</sup> Of course a victim's answer to these questions is often yes, and maybe rightly so. The abuser might be stalking the victim, likely causing the victim to have trouble sleeping and also causing the victim to blame the abuser for a number of the victim's other problems. Under the circumstances, this is appropriate behavior, not a personality disorder. But when tests like the MMPI-2 are interpreted without consideration for the violence in the victim's life, the test results can be unreliable and inaccurate.

The second reason that domestic violence victims might appear to have a personality disorder or mental illness is that the disorder may be caused by abuse. Some domestic violence victims have PTSD.<sup>147</sup> This is not surprising, considering that a DSM-IV diagnosis of PTSD requires the person to have suffered a

139. *Id.* at 87.

140. McCurley, *supra* note 136, at 298–306.

141. *Id.*

142. Nancy S. Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*, 39 FAM. L.Q. 87, 87 (2005).

143. *Id.* at 88.

144. *Id.*; BANCROFT & SILVERMAN, *supra* note 29, at 118.

145. BANCROFT & SILVERMAN, *supra* note 29, at 118.

146. *Id.*

147. Erickson, *supra* note 142, at 104.

traumatizing event in which they responded with “intense fear, helplessness or horror.”<sup>148</sup> Any person can develop PTSD if subjected to a traumatizing event.<sup>149</sup> This is a normal response to an abnormal event.<sup>150</sup> But PTSD can be confused with other personality disorders because many people suffering from PTSD have elevated scores on a MMPI-2 for trust issues, paranoia, and suspiciousness.<sup>151</sup>

In domestic violence situations, PTSD is caused because the victim has suffered one or more very traumatizing events at the hands of her abuser. PTSD does not necessarily cause the victim to be a bad parent or an improper custodian. The abuser should not be given custody of a child because he has succeeded in damaging the mental health of his victim.

In some circumstances, psychological evaluations are not a good way to determine if someone is a good or bad parent.<sup>152</sup> For instance, there is a lack of evidence demonstrating that when someone has a psychological disorder, he or she is automatically a bad parent.<sup>153</sup> Good parents are sometimes able to shield their children from the effects of their mental health issues.<sup>154</sup> This is exactly what a domestic violence victim is trying to do by leaving the cause of her mental health issue, the abuser.

Finally, studies have shown that when a domestic violence victim leaves her abuser and is able to heal from the traumatic events of her life, her MMPI elevations will normalize.<sup>155</sup> Domestic violence victims were not crazy before they were abused,<sup>156</sup> and they are not crazy afterward; they just need time to heal. Giving a victim’s children to the person who caused her trauma is not the way to help her or the children heal.

If the court orders, or the CE recommends, a psychological evaluation, the attorney should vigorously oppose the evaluation, especially in a case that involves domestic violence. These tests are unreliable and invalid for use in a custody evaluation and are often misinterpreted in cases involving domestic violence. Their use only

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148. *Id.* at 105.

149. *Id.* at 106.

150. *Id.*

151. *Id.* at 107.

152. BANCROFT & SILVERMAN, *supra* note 29, at 118.

153. *Id.*

154. *Id.*

155. Erickson, *supra* note 142, at 103.

156. *Id.* at 104.

lengthens the time and increases the cost of the court proceeding.<sup>157</sup>

If the court orders a psychological evaluation, the attorney should question the evaluator on the validity of these tests when used in custody evaluations with domestic violence victims. If the evaluation shows elevated areas, question whether this could have been caused by the domestic violence. The use of a psychological test should include a description of why the test was used and its limitations.<sup>158</sup> If this description is lacking, question why.

*F. Use of Experts*

Although experts are not often used in family court, it is appropriate to do so and can be advantageous to the client's case. An expert in domestic violence can help explain the dynamics of domestic violence and the effects of domestic violence on victims and children.<sup>159</sup> An expert can also testify in general terms about domestic violence or in more specific terms after being given the chance to review the case file.

Finding an expert on domestic violence is not as difficult as it may seem. Experts are qualified by their education and their work experience. Rule 702 of the Federal Rules of Evidence states that a witness is "qualified as an expert by knowledge, skill, experiences, training, or education."<sup>160</sup> Therefore, a witness does not need to have a master's degree or Ph.D. Anyone who has significant experience working with domestic violence victims can qualify as an expert.<sup>161</sup> Many domestic violence organizations have advocates with years of experience working with domestic violence victims, including those who have testified before or may be willing to testify for the first time.<sup>162</sup> Most of these organizations do not charge for the advocates to testify; some organizations charge a nominal fee. It is not advisable to use the advocate or the program working with the victim to testify as the expert. Once on the stand, everything the advocate knows about the victim may be open for

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157. Fields, *supra* note 93, at 2.

158. McCurley, *supra* note 136, at 301.

159. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1086 (1991).

160. FED. R. EVID. 702.

161. *See id.*

162. To locate a local domestic violence organization, call the National Domestic Violence Hotline at 1-800-799-7233 or visit their website at <http://www.ndvh.org>.

cross-examination, which could be dangerous for both the victim and the case.

*G. Harassment Through the Court System*

Some batterers use the court system to continue to harass and control their victim. This desire often manifests itself in the excessive filing of motions. Some of the motions may be unfounded or only partially true. There are three options an attorney can employ to stop the flow of these motions:

1. Ask for attorney fees.<sup>163</sup> This process starts with a letter to the batterer (or batterer's attorney, if represented) stating that the victim's attorney has received the motion, has found it has no basis in law or fact, and requests the withdrawal of the motion.<sup>164</sup> Advise the batterer that if the motion is not withdrawn within twenty-one days, the attorney will seek attorney fees under Rule 11 of the Rules of Civil Procedure. Also, cite any other state law that provides for these fees.<sup>165</sup>

If the unfounded motion is not withdrawn, the attorney can file a motion for sanctions. The motion for sanctions should ask for a finding that: (1) the unfounded motion violates Rule 11 and applicable state law; (2) the abuser's motion is without basis in fact or law; (3) notice was served on the abuser (or counsel) to withdraw the motion; and (4) sanctions are appropriate against the abuser and counsel, if represented. The motion should ask for a specific amount of attorney fees and include an accompanying affidavit specifically outlining the hourly rate and detailed itemization of activities.<sup>166</sup>

2. File a motion for the batterer to pay a bond on all future

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163. Even pro bono attorneys can ask for reasonable attorney fees. Pro bono attorneys can determine a reasonable rate based on the location of the case and the experience of the attorney.

164. See MINN. R. CIV. P. 11.02 (requiring that all motions and pleadings have a sufficient basis in law and fact).

165. In Minnesota, sanctions in civil actions can be sought under Minnesota Statute section 549.211 (2006).

166. See MINN. R. GEN. PRACT. 119 (detailing the paperwork required for a petition for attorney fees).

2007]

## BATTERED WOMEN

967

motions.<sup>167</sup> The amount of the bond will depend on the financial resources of the abuser. For some abusers, fifty dollars would suffice while, for other abusers, the bond may need to be five hundred dollars or more.

3. File a motion requesting that the court approve all future motions before the motion is scheduled on the docket. Here, whenever an abuser files a motion, the judge must read the motion first and then find that the motion is legitimate. If the court finds that the motion is acceptable, the court will schedule a hearing date.

These options are not mutually exclusive and can be requested at the same time. One can also file a motion for option two and, in the alternative, option three.

Another common motion filed by the abuser is contempt. Some abusers will be granted specific types of relief but never really intend to follow through with what they have been granted.<sup>168</sup> Nevertheless, once a victim denies the abuser's attempt to execute on the court order, the abuser files a contempt action. An attorney should keep in mind the doctrine of unclean hands as one defense to the contempt action. The doctrine of unclean hands states that the plaintiff, in this case the abuser, is not entitled to equitable relief because the plaintiff is acting unethically or in bad faith in relation to the contempt issue.<sup>169</sup> Attorneys should think about this doctrine, especially in the area of returning property.

Oftentimes there are property issues when a couple separates. Sometimes the court issues an order requiring the victim to let the abuser retrieve property from a shared dwelling. In domestic violence cases, the court order normally requires a police presence. Often abusers will try to get around this requirement because of its cost, their desire to harass the victim, or their desire to steal from the victim. Once the victim refuses to allow the abuser to obtain the property, the abuser files a contempt action. The doctrine of unclean hands applies because the abuser's failure to involve the

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167. This is the most extreme option because it can mean literally preventing someone from having access to the court. But this particular option works well when the batterer has filed multiple frivolous or dilatory motions. The court in these situations may be all too willing (and justified) to restrict the abuser's access to the courts.

168. Zorza, *supra* note 17, at 1121.

169. BLACK'S LAW DICTIONARY 268 (8th ed. 2004).

police amounts to a bad faith execution of the court order.

The doctrine of unclean hands may also apply in other situations, and it is important for attorneys to continually look for new and innovative ways to use legal doctrine.

#### IV. POST-FAMILY COURT ACTIONS

Finally, when things go wrong at the district court level, there is the option of appealing the decision. While the thought of appealing a wrong court order may not be novel, sources from whom an attorney can receive support might be. Attorneys should think about who is knowledgeable about domestic violence and the law in their community. This could be the state's domestic violence coalition, a legal advocacy project, or even legal services.<sup>170</sup> Many of these programs are eager to help, think through a strategy, provide help in the procedure of an appeal, edit documents, or help with research. Often these organizations can be involved as little or as much as the attorney desires. If necessary, these programs might be willing to file amicus briefs on specific topics or areas of the law and are linked to national organizations that can also provide help.

#### V. GENERAL IDEAS, TIPS, AND THOUGHTS

As a final word, the following general ideas and tips might be helpful to an attorney working with a domestic violence victim. Ask the client to relate the bad things the abuser is going to say, whether true or false, about the victim, the children, and the situation. Explain that it is better to know at the outset so that the attorney can either refute it or be prepared to minimize it. Explain that surprises during the trial will make everyone look unprepared and uninformed, leaving the attorney to scramble for information.<sup>171</sup>

In addition to asking the client about what information might hurt the case, the attorney might want to think about checking the

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170. For example, in Minnesota there are attorneys from various domestic violence organizations who work together in screening possible appeals. If the case is approved, this group can provide support to the attorney who is appealing a decision. For more information, please contact the Battered Women's Legal Advocacy Project, <http://www.bwlap.org>, or the Minnesota Coalition for Battered Women, <http://www.mcbw.org>.

171. I learned this lesson the hard way. I was in court for an order for protection and during testimony the abuser said, "But she threw boiling hot water on me!" I did not know the story, and it left me stammering trying to figure out what to do next. That is why, now, I always ask.

court records of any other case in which the client has been involved.<sup>172</sup> There may be helpful or harmful information in a GAL or CE report.<sup>173</sup> Also, reviewing the court records of the abuser can be very helpful.<sup>174</sup> The attorney should obtain copies of any useful documents which could be used to impeach the abuser.<sup>175</sup>

If at all possible, encourage the victim to work with the local domestic violence program. Advocates are helpful in many ways. A competent advocate can help prepare a victim emotionally and encourage the victim to speak to the attorney about problems or concerns. Advocates can provide emotional support for the victim in a way that the attorney cannot or maybe should not. Advocates can also help the victim obtain documents and other information that are helpful for the case; this, in turn, can help keep costs down. A good legal advocate can help an attorney think through strategy, and can provide proper counterpoints when the attorney might be straying away from the most important thing, the victim and the children's safety.<sup>176</sup>

## VI. CONCLUSION

Working with domestic violence victims can be very difficult. Some days it seems the whole legal system is working against the attorney and the victim. But in working together to create tools and techniques, we all can provide better, more effective legal advocacy to victims of domestic violence. If, as attorneys, we do the best that we can do, instead of hearing statements like the one made at the beginning of this article, we can hear statements like this one:

He [the victim's attorney] was better than any *Law and Order* show I had ever watched. He has [Julie's] father so flustered he couldn't tell the court what his name was. Those that have followed my legal saga over the years know; I haven't ever had a good day in court. Well, I did that day!<sup>177</sup>

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172. Zorza, *supra* note 60, at 3.

173. *Id.*

174. *Id.*

175. *Id.*

176. Finally, take care of yourself. An attorney is no good to their clients if they are burnt out. Talk with other attorneys who represent domestic violence victims on a regular basis to receive support and to ground yourself.

177. Anonymous battered woman.